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No. 728

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

R. P. FARNSWORTH & CO., INC.
Petitioner

versus

TRI-STATE CONSTRUCTION COMPANY, et al
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR TRI-STATE CONSTRUCTION COMPANY IN OPPOSITION

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OPINION BELOW

The opinion of the U. S. Court of Appeals for the Fifth Circuit is reported at 271 F. 2d 728.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1959. A petition for a rehearing, timely filed, was denied on December 1, 1959. The petition for a writ of certiorari was filed on February 23, 1960. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Petitioner's complaint, boiled down to its essence, is that the trial judge gave conflicting charges to the jury. In order to grant the writ, this Honorable Court must find that the Court of Appeals, by not ordering a reversal because thereof, has thereby ". . . *so far*

departed from the accepted and usual course of judicial proceeding, or *so far sanctioned* such a departure by a lower court, as to call for an exercise of this court's power of supervision."[1]

Now, we submit that there are no special and important reasons[2] nor anything of national importance to the Federal System of Jurisprudence[3] involved in the mere presence of certain conflicts in a charge to a jury and especially is this true where the conflict was produced at petitioner's specific request if not actual demand. The Fifth Circuit in acknowledging the fact there was some conflict went on to point out that respondent's requests to charge correctly stated the law of the case, and that if any conflict was present it was due entirely to petitioner's own conduct which, under the circumstances, estopped it from complaining thereof.[4]

This view of the law is certainly sound and is thoroughly documented by both state and federal authority.[5]

This Honorable Court is thoroughly familiar with its Rule 19 and its many decisions construing its limited area of review. That portion of the rule in question obviously contemplates extreme situations which are not present in this case. There has neither been here a departure nor an approval of a departure, extreme or otherwise, as will more fully appear later in respon-

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[1] Sup. Ct. R. 19 (1) (b) (Italics ours); Pet. Brief, p. 2
[2] Sup. Ct. R. 19 (1)
[3] Rogers v. Missouri Pacific Railroad Co., 352 U.S. 559
[4] 271 F. 2d 728, 731 (1959)
[5] United States v. Wurtsbaugh, 140 F. 2d 534 (5th Cir. 1944); Illinois Central R. Co. v. Griffin, 80 F. 278 at 282 (7th Cir. 1897); Dawson Paper Shell Pecan Co. v. Montezuma Fertilizer Co., 19 Ga. App. 42 [5], 90 S.E. 2d 984 (1916); Alabama Great Southern R. Co. v. Johnson, 140 F. 2d 968 at 970 (5th Cir. 1944); Bryant v. Hall, 238 F. 2d 783 at 788 (5th Cir. 1956); Little Rock & M. R. Co. v. Moseley, 56 F. 1009 (1893)

dent's brief. Further, this Court needs no reminder that it does not grant certiorari to review evidence and discuss specific facts nor cases involving merely unique circumstances, but that the power of certiorari is to be exercised sparingly and only in cases of peculiar gravity and general importance to the public as distinguished from the parties.[6]

STATEMENT

Being unable to agree with or acquiesce in a large number of the statements contained in the petition for a writ of certiorari, we feel compelled, in order that the Court might have a complete and accurate picture before it, to give our version of the case.

This case was instituted by Tri-State Construction Co., (hereinafter called Tri-State) against R. P. Farnsworth & Co., Inc., (hereinafter called Farnsworth) by filing a petition in the U. S. District Court for the Eastern District of Georgia, Savannah Division, seeking the recovery of $146,518.28 for labor and materials furnished by it at Fort Stewart, Georgia. Jurisdiction was based upon diversity.

Briefly, Tri-State contended that Farnsworth had contracted with the United States for the erection of a family housing project consisting of seventy-four multiple-unit dwellings, under which Farnsworth would be paid a total of $6,230,100.00. This contract, dated February 27, 1957, included certain plans and specifications prepared by Government architects under which it was contemplated that the construction

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[6] Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393; National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502; Carter v. Atlanta & Saint Andrews Bay Railway Co., 338 U.S. 430, 437; Rogers v. Missouri Pacific R. Co., 352 U.S. 559.

would be of the conventional, rather than of the prefabricated type, conventional construction meaning that raw materials were to be delivered to the site in piece-meal form, then cut and put together piece by piece so as to fit the specifications, taking into account and making allowances for work to be done by the mechanical trades. This type of construction is entirely different from prefabrication which simply involves doing all the cutting and putting together of the lumber at a distant plant with the finished product then shipped to the site in the form of panels to be erected there.

Subsequently, American Houses, Inc., (hereinafter called American) interested Farnsworth in using American's prefabricated units, and introduced Tri-State as a local contractor experienced in installing these units. The U. S. Corps of Engineers, representing the United States, agreed to the switch-over from conventional to prefabricated construction with the express understanding, however, that in order to compensate for the lack of appropriate plans and specifications, two things would have to be done before the prefabricated materials were cut and put together at American plants and shipped to the site: (a) "Pilot" buildings would have to be manufactured and shipped by American and then erected by Tri-State; (b) Shop drawings would have to be prepared by Farnsworth and then submitted to and approved by the Government showing the Government's representative how prefabrication would accomplish the desired result (R. 254, 302).

On March 18, 1957, Farnsworth and American entered into a contract designated as a "Purchase Order," whereby American agreed to ship the panels to the

job, after they had been prefabricated at its plant, for a total price of $860,178.00 (R. 1464). As of the same date, Farnsworth and Tri-State entered into a contract whereby Tri-State agreed to erect the panels at the site for a price of $191,466.30 (R. 1460). As pointed out by the Court of Appeals in its decision, "One-fifth of the work on the job would be done by Tri-State and American, and the remaining four-fifths by Farnsworth or by other subcontractors.[6] It may be observed that the combined contract price for the work of American and Tri-State was slightly more than one-sixth of Farnsworth's total contract price" (271 F. 2d 728, 730).

Tri-State alleged and proved that the pilot buildings were not closed in during the week of April 22, 1957, as called for in its contract with Farnsworth, because of the failure of Farnsworth's employees to have the foundations ready in time for them (R. 93, 94); that because of this delay, many of the other buildings were shipped to the site before the parties and the mechanical trades had had an opportunity to inspect and check the pilot buildings and report the required changes or ramifications back to American's plants; that when Tri-State was finally able to begin erecting the pilot buildings, Farnsworth requested Tri-State's employees (over whom it had control) to cease erecting pilot buildings and to start erecting these other buildings which had begun to accumulate on the premises (R. 103); that the pilot houses, because of Farnsworth's actions and deficiencies, were never allowed to fulfill their function (R. 259). Tri-State further contended that the shop drawings which were to be prepared by Farnsworth and then submitted to and approved by the Government were never prepared by Farnsworth

nor submitted to or approved by the Government (R. 299-301).

Tri-State alleged and proved that in early May 1957, the whole project, with no pilot houses to perform their function, was thrown completely off schedule and into a state of turmoil (R. 102-104); that prefabricated panels were erected without any cutting having been done at the plants to the panels to allow for the mechanical trades due to the inability of those trades to get in and inspect the pilot buildings which had not been closed-in for them as a result of Farnsworth's actions and deficiencies (R. 103); that the construction, instead of being 100% prefabrication as all the parties had agreed upon was now reverting to conventional construction; that the whole picture had been changed and distorted by the necessity of now doing this cutting and similar work on the premises rather than at American's plants; that representatives of Farnsworth and Tri-State met in early May and modified their written agreement so as to provide that now Tri-State, who had the only carpenters on the job, would undertake all of this work which was not covered by its original contract with Farnsworth, with the express understanding that Farnsworth would pay Tri-State as the items were completed and invoices submitted (R. 126). It was pointed out that this modification of the original contract was confirmed by a letter written by Tri-State's chief representative on the job to Farnsworth's chief representative there (R. 127).

Tri-State also alleged and proved that relying upon this new agreement it went forward with the work called for thereunder; that on September 27, 1957, it presented Farnsworth with its invoice for the work

it had completed under the new agreement; that Farnsworth refused to pay Tri-State anything at all and gave no reason whatever for its refusal, and that Farnsworth knew full well that Tri-State was financially unable to continue to finance this additional work for Farnsworth unless Farnsworth kept its payments on a current basis. As the result of this refusal to pay, Tri-State alleged and proved it was prevented from completing its work under the original contract as well as the work under that contract as modified in early May 1957, and was thereby forced to leave the job; that it could no longer finance Farnsworth's obligations and Farnsworth knew this (R. 432, 433).

The above constitutes the basis of Tri-State's cause of action against Farnsworth. Tri-State did not, as Farnsworth says it did in its petition for writ of certiorari, base its "cause of action on the theory that its abandonment of the work was justified by American's failure to furnish proper materials and to pay certain sums which it owed Tri-State, as well as by petitioner's failure to pay Tri-State for alleged extra work" (Pet. p. 7). Rather, the cause of action was predicated on the theory that Farnsworth's refusal to pay, when due, certain sums of money which it had obligated itself to pay Tri-State under the contract, as modified, constituted a material breach of the contract which, and Farnsworth knew this, prevented complete performance of the contract by Tri-State. This breach by Farnsworth, going to the very heart of the contract since the parties knew that only through timely payments could Tri-State finance all of the extra work it was doing at the behest of Farnsworth, entitled Tri-State to treat the contract as rescinded and thereafter seek a recovery from Farnsworth for

the value of its labor and materials which had been *accepted* by *Farnsworth and for which Farnsworth had been paid in full by the United States.*

After Tri-State filed its pleadings, Farnsworth filed a counterclaim against it and its surety for damages caused by what it alleged to be Tri-State's default. Farnsworth also filed a thirty party action against American and its surety because it contended American had breached its contract with Farnsworth. American then counterclaimed against Farnsworth for unpaid materials and cross-claimed against Tri-State for indemnity for any sums which petitioner might recover from it.

The case proceeded to trial before a jury, and after ten full days of hearing testimony, argument, and instructions by the Court, a verdict was rendered for Tri-State against Farnsworth in the amount of $133,020.80, (which was $13,497.48 less than the amount sued for) and for American against Farnsworth in the amount of $151,142.35 (R. 1395). Motions for judgments notwithstanding the verdict or, in the alternative, for new trials filed by Farnsworth were denied by the District Judge (R. 1414).

On appeal, the Court of Appeals affirmed the judgments of the District Court.

ARGUMENT

A

1—Erroneous and Conflicting Charges

a

Farnsworth urges that its petition for a writ of certiorari should be granted because the trial court gave

in its charge to the jury certain instructions requested by Farnsworth that were in conflict with certain instructions requested by Tri-State which were also given in the Court's charge.

It is felt that it might be helpful to the Court if the circumstances surrounding this alleged error were clarified. In denying Farnsworth's motions for judgments notwithstanding the verdicts or, in the alternative, for new trials, the trial court had this to say about the point now being raised by Farnsworth:

> "As one of its grounds for motion for new trial, the defendant now complains that the Court's charge to the jury embodied two separate and contradictory constructions of the various contracts existing between the parties. It is to this point that the Court now addresses its attention.
>
> "The evidence was closed during the A.M. of Thursday, May 30, 1958. The Court advised counsel that oral arguments were to be made in the afternoon of May 30, 1958, and that the Court would charge the jury on Friday morning, May 31, 1958. The Court then in the absence of the jury, reviewed with respective counsel the various requests to charge that had been submitted to the Court. The Court advised counsel that it intended to charge all of the various requests to charge submitted by counsel. Counsel for plaintiff, Tri-State Construction Company, thereupon stated to the Court that in its opinion certain of the charges requested by defendant Farnsworth placed an erroneous construction upon the contracts in question and argued to the Court that these charges should not be given to the jury. The

Court felt at the time that the point raised by plaintiff's counsel raised a serious question, final decision on which was deferred. Counsel for the respective parties were permitted to orally argue their contentions to the jury during the afternoon of Thursday, May 30, 1958.

"During the evening of May 30, 1958, and after further study of the point raised by plaintiff's counsel with regard to the charge, the Court came to the decision that certain of defendant Farnsworth's charges did place an erroneous construction upon the contracts involved. The Court decided that defendant's requests, specifically Nos. 2, 6, 8, 9, 10, 11, 14, 15 and 20, placed an improper construction upon the contracts and circumstances existing between the parties and should not be given to the jury in charge. A conference was held in the Court's Chambers shortly before 10:00 A.M. on Friday, May 31, 1958, at which time counsel for the defendant, R. P. Farnsworth & Co., Inc., were advised of the Court's final decision with regard to their requests to charge. At this point, counsel for the defendant strenuously objected to the Court's action and invoked the strict application of the following portion of FRCP Rule 51:

> 'At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to

the jury, but the court shall instruct the jury after the arguments are completed . . .'

"In face of defendant's objections, the nature of which were thoroughly reviewed with defendant's counsel, the Court acceded to counsel's request and gave in charge to the jury the defendant's requests numbered 1 through 22.

"After a most thorough consideration of this phase of the case, the Court is convinced that the interpretation placed upon the contracts by the plaintiff, Tri-State Construction Company, and as embodied in their requests to charge correctly states the law of the case. Further, the Court is of the opinion, under the circumstances as outlined above, that the defendant is estopped to complain of any conflict produced by its erroneous interpretation of the law as embodied in its requests to charge and therefore this ground is without substance and merit" (R. 1414-1417).

We think the position of the trial court was well taken. It has long been the law, not only in the state where this case was tried, but also in the majority of other jurisdictions, that there should be no reversal for invited error. In *Dawson Paper Shell Pecan Company v. Montezuma Fertilizer Company*, 19 Ga. App. 42 (5), (90 S.E. 2d 984), it was held:

"When the trial judge, in his general instructions, correctly states the law to the jury, and one of the parties, by a written request, induces the court to charge the contrary of the law, the party making the request will not be heard to say that the charge was misleading, confusing, and prejudicial to his rights. If the two excerpts complained of in

the fifth special ground of the motion for a new trial are confusing, *the request on the part of the plaintiff in error made the confusion*; . . ." [Italics ours]

In *Illinois Central R. Co. v. Griffin*, 80 F. 278 (7th Cir. 1897), Judge Woods, in speaking for the court, stated at page 282:

> "The alleged inconsistencies between instructions given at the request of the plaintiff in error and the charge of the court to the jury do not go to material questions, and if they did there would be no available error, if the court's charge was right. If the court, of its own motion, gives inconsistent charges, there may be an assignment of error upon the one which is wrong, or perhaps on the fact of inconsistency; *but, where the inconsistency is between a proper charge and an erroneous instruction given upon request, the requesting party may not complain.*" [Italics ours]

Again, in *U. S. v. Wurtsbaugh*, 140 F. 2nd 534 (5th Cir. 1944), Judge Hutcheson, speaking for the court, states at page 537:

> "Under the plainest principles, it may not, having invited the direction of the verdict and the entry of the judgment, . . . put the judge in error for doing what it invited him to do."

And in *Bryant v. Hall*, 238 F. 2d 783 (5th Cir. 1956), Circuit Judge Borah, speaking for the Court, stated at page 788:

> "While we think that the court should have refused to give this charge, by reason of the fact that the evidence indubitably shows that appellee

did not blow her horn, appellants are in no position to complain for they invited the court to commit error by requesting it to charge Sec. 68-1635 (b)."

Or, as stated in *Little Rock & M. R. Co. v. Moseley*, 56 F. 1009 (8th Cir. 1893):

"A party will not be heard to complain of an error which was committed at his instance, or to criticize an instruction of a trial court because it took a view of the law or the testimony which the party himself entertained, as shown by his requests for instructions."

Finally, in *Smails v. O'Malley*, 127 F. 2d 410, 414 (8th Cir. 1942), it is held that:

"A party cannot be heard to complain in an appellate court of an error which he invited in the lower court in a civil case. 'Such errors, if any, are to be imputed to the party making the request rather than to the court.'"

As additional authority to the proposition that a party will not be heard to allege errors in instructions which were given at his request by the trial court, we respctfully refer the Court to 4 C. J. Appeal and Error, Sec. 2619, p. 707; 14 R.C.L. 815; *Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586; *Matheson v. U. S.*, 227 U. S. 540; 5 C. J. S. Appeal and Error, Secs. 1501-1516, pp. 857-970; *Bryant v. Hall*, 238 F. 2d 783, (5th Cir. 1956).

We do not feel it would be in the interest of a fair administration of justice to permit a party to insist that the trial court submit his written requests to the jury under the penalty of having to declare a mistrial if it didn't do so, and then, if the verdict goes

against him, grant that party a new trial on the ground that his written requests were given.

If the substance of the instructions requested by Farnsworth expressed the correct principles of law to be applied to the controversy, then obviously it would have been error for the trial judge to refuse to give them. On the other hand, if those requests to charge did not contain correct principles of law to apply to the controversy, then just as obviously, Farnsworth should not be allowed to complain because they were given, since the giving of them could not have harmed Farnsworth. The fact that the giving of those requests to charge upon the insistence of Farnsworth might have created confusion should not be allowed to be used as a vehicle by Farnsworth to obtain a reversal, since Farnsworth not only invited the confusion but, in fact, insisted upon it at the risk of a mistrial. The verdict of the jury should be evidence enough of the fact that it was not confused by the Court's giving in charge those requests of Farnsworth, since it ignored them.

Furthermore, it should be remembered that in its complaint and throughout the trial, Tri-State contended that its duties, rights and obligations were fully set out in its subcontract with Farnsworth and that the terms of the subcontract in no way placed Tri-State in the position of guaranteeing the performance of American under the terms of its purchase order with Farnsworth. Farnsworth contended throughout that the three parties had an integrated three-way agreement. Actually, though the interpretation placed on the contracts by Farnsworth was and is erroneous, the error in interpretation and possibly in the charge

is immaterial for the reason that in each of the requests to charge, prepared and submitted by Tri-State, Tri-State's right of recovery was bottomed on an express *or* implied promise to pay *outside the terms of the written contract*. In each instance, Tri-State's claimed right of recovery was conditioned or limited upon the jury's prior finding that Farnsworth was in default and that Tri-State was not in default under the terms of the written contract. Therefore, if the jury found as it was entitled to, and ultimately did, that Farnsworth had breached its contract with Tri-State and that Tri-State was otherwise not in default, then and only then was the jury entitled to determine the value of the services and material that Tri-State had expended in Farnsworth's behalf.

Stated differently, had the jury found that Tri-State was the party in default, then the jury would have been entitled to follow the charges submitted by Farnsworth, practically all of which were related to the written contracts between the parties. We find it difficult to see how Farnsworth can complain when the court adopted its interpretation of the written contracts, however erroneous they might have been, and when the jury would have been entitled to follow the theory advanced by Farnsworth had they *first found* that Farnsworth was not in default in the matter.

As has so often been repeated, the object of all legal investigation is the ascertainment of the truth. If, in fact, the jury found, as it did, that the truth of the matter was that Tri-State spent $133,020.80 of its own money in performing services and furnishing materials for Farnsworth, all of which were accepted by Farnsworth, thereby enabling Farnsworth to get full credit and to collect in full therefore from the United States,

then justice, fairness and equity demanded that Farnsworth pay Tri-State therefor so long as Tri-State was not in default in its contractual obligations to Farnsworth.

As so aptly stated by Judge Soper, in *Ross Engineering Co. v. Pace*, 153 F. 2d 35, 45, (4th Cir. 1946), involving substantially the same situation as here:

> "It appears from this review that the statement in the judge's charge, that A.R.M. [subcontractor] contended that it had an oral agreement with Ross [general contractor] as to the roads, should have been omitted; but we do not think that this error was prejudicial to Ross in the view we take of the legal principles which govern the case. The judge left it to the jury to determine whether in fact there was such an express agreement and stated fully the opposing contention of Ross denying the existence of the agreement and attributing the damage to the delinquency of the contractors; and finally the judge clearly told the jury to find their verdict on this point for Ross if they should conclude that the damage was done without fault of Ross.
>
> "The jury's verdict for $30,400 was necessarily based upon the finding that the damage to the roads was caused by Ross or by persons within its control; and upon this hypothesis, we think that the liability of Ross to A.R.M. is established, whether the case be considered an action at common law or a suit under the Miller Act. Ross was the general contractor in control of the entire project. . . . The result was that the roads had to be reconstructed in order to conform to specifications

and to entitle Ross to compensation under its contract with the United States.

"*It follows that a promise to pay for the benefits conferred should be implied. The situation is akin to that which occurs when one accepts goods or services from another who expects payment for them.* It is urged upon us that no intention to pay for the roads can be attributed to Ross in this case in the face of its vigorous denial of all liability. See *Baltimore & O. R. v. United States*, 261 U. S. 592, 43 S. Ct. 425, 67 L. Ed. 816. But this attitude rests on the contention that the damage was caused by faulty work and since this view is no longer tenable in the light of the jury's verdict, *the defendant is forced into the field of quasi contracts where the rule is that, irrespective of the intent of the party to be charged, liability arises when one is enriched and receives a benefit at another's expense for which equitably he ought to pay.* It has been held in a variety of circumstances that when such a situation occurs, a contract to pay is implied in law." [Italics ours]

Since, therefore, Tri-State's requests to charge based its right of recovery on an express or implied promise by Farnsworth to pay for this extra work performed by Tri-State outside the terms of the written subcontract, and since the jury by its verdict necessarily found that the services had been performed and the materials had been furnished by Tri-State for the benefit of Farnsworth and accepted by Farnsworth, the latter should be required to pay their fair value and not be permitted to escape therefrom by invoking as a ground for reversal an alleged erroneous technicality arising from Farnsworth's own creation.

b

We hasten at this juncture to point out to the Court that the excerpts from the trial court's instructions quoted by Farnsworth on page 11 of its petition for a writ of certiorari are quite misleading in that they have been lifted out of context. For example, it is there stated that:

> "In connection with the first ground, the trial court instructed the jury that 'in the event you should find that Tri-State has incurred additional expense for labor or materials as the sole and direct result of the failure of American Houses to furnish materials . . . Tri-State would be entitled to recover any such expense from the defendant Farnsworth.'"

At first blush one would naturally conclude that the trial court was placing the ultimate and final responsibility and liability upon Farnsworth for the failure by American to furnish materials. The trial court said no such thing nor did it intend to convey any such meaning. What it did charge the jury was this:

> "Gentlemen of the jury, in the event you should find that Tri-State has incurred additional expense for labor or materials as the sole and direct result of the failure of American Houses to furnish materials as provided for in the contract between American Houses and Farnsworth, I charge you that Tri-State would be entitled to recover any such expense from the defendant Farnsworth, *and in that event Farnsworth in turn would be entitled to recover an equal amount from American Houses*" (R. 1302). [Italics ours]

In the next two excerpts from the Court's charge quoted by petitioner on page 11, it is to be again observed that they have been lifted out of context and, because of that, they do present a distorted picture. It is these two charges which petitioner claims denied it "any recovery from Tri-State if American failed to furnish proper materials or was indebted to Tri-State" (Pet., p. 12).

It should be pointed out here that these two charges, when read in their entirety, show that the Court was addressing itself at the time to the contentions of Tri-State's surety, American Surety Company. We submit that these charges dealt only with the conditions under which Farnsworth or American could recover as co-obligees on the performance bond given by Tri-State. They did not relate to, or have anything whatsoever to do with, whatever right Farnsworth may have had to recover outside of the bond for alleged breaches of the subcontract by Tri-State. This question, and the corresponding question as to the right of Tri-State to recover from Farnsworth was fully covered elsewhere in the charge.

Farnsworth and American were joint obligees in the Tri-State bond and their rights, whatever they were, were joint and had to be asserted jointly (13 C. J. Contracts, Sec. 562, p. 575).

Tri-State could not perform its subcontract unless and until Farnsworth had performed the preliminary work it was supposed to perform and American Houses had furnished the prefabricated materials it was obligated to supply in accordance with the contract documents, and neither of them could recover on the bonds unless both had discharged their obligations so as to make possible performance by Tri-State.

Certainly Farnsworth could not recover on the Tri-State bond if the failure of American to furnish prefabricated materials as called for in its purchase order or of Farnsworth itself to do related work in a workmanlike manner caused or contributed to the failure of Tri-State to complete performance.

Farnsworth contracted to obtain the prefabricated units from American and to furnish them to Tri-State for erection, and as between Farnsworth and Tri-State it was clearly the right and duty of Farnsworth to see that prefabricated units, built to specification in a workmanlike manner, were furnished to Tri-State by American, and Tri-State was entitled to assume that Farnsworth would see that this was done, and unless it was done Farnsworth clearly could not recover on the Tri-State bond.

We submit, therefore, that these charges were sound, but, even if this were not true, they were not prejudicial because they relate only to the conditions upon which Farnsworth or American could recover on the Tri-State bond for breach of the subcontract by Tri-State and the jury found that the subcontract was breached by Farnsworth and not by Tri-State.

The charges complained of obviously had nothing whatsoever to do with the right of Tri-State to recover from Farnsworth and no application whatsoever in the case unless and until the jury determined as a preliminary matter that Tri-State had breached its subcontract and then came to consider the question of liability on the bond.

A verdict in favor of Tri-State and against Farnsworth means that on this basic question the jury found that Farnsworth had, and Tri-State had not, breached

the subcontract, and the charges excepted to, therefore, never became operative with respect to any issue the jury decided or was called upon to decide.

c

In its first statement under this section of its brief, petitioner states: "The second basic element of Tri-State's claim was petitioner's failure to pay for alleged extra work."

As we have already pointed out, it was petitioner's failure to pay for extra work which it had agreed to pay for that constituted the sole basic element, and not the second basic element of Tri-State's cause of action.

Petitioner then complains of the giving by the Court of Tri-State's requested instruction embodying the principles of *quantum meruit*. We fail to see how this could have been prejudicial to Farnsworth since it was one of the principal issues in the case and, as pointed out by the Fourth Circuit's decision in the Ross Engineering Co. case, *supra*, (153 F.2d 35, 45), "it follows that a promise to pay for the benefits conferred should be implied . . . the defendant is forced into the field of quasi contracts where the rule is that, irrespective of the intent of the party to be charged, liability arises when one is enriched and receives a benefit at another's expense for which equitably he ought to pay."

d

This section repeats the criticisms and complaints previously set forth under subsection a of Section A of the petition, and our arguments in opposition to the position therein taken should not and will not be repeated here.

2—CONTRACT INTERPRETATION BY THE JURY

We feel that the Court of Appeals has adequately covered this exception or criticism in its decision when it stated:

> "It would have been better if the court had omitted the concluding phrase, 'and the duties and obligations imposed upon the respective parties.' The construction of the written contracts was of course, for the court, though factual issues were presented as to the meaning and purpose of certain technical words and ambiguous terms, such as 'pilot house' and 'shop drawings.' The courts meaning and intent were, however, reasonably clear, that is, to submit to the jury the pleadings and the contracts in order for the jury to see their contents. The error in the use of the concluding phrase is not, in our opinion, sufficient ground for setting aside the jury's verdict and the judgments entered thereon" (p. 28-29 Petitions Appendix).

We might point out further that the trial court made a somewhat similar reference to the contracts when it stated:

> "The Court will not attempt to exhaustively review or detail the terms and conditions of the aforementioned contracts. These documents are attached to the pleadings which will be given you at an appropriate time and you, Gentlemen, are invited and instructed to refer to these documents to determine their content" (R. 1282).

Obviously, the trial court was not directing the jury to interpret the agreements, but it was simply putting

the contracts in the same posture as the pleadings and directing the jury to read both the pleadings and the contracts in order to determine their content.

However, even if the court had directed the jury to interpret the provisions of the agreements, the court could have very properly done so. There were several terms used in the contracts and contract documents which did not lend themselves to a definite meaning. For instance, there was a great deal of testimony throughout the record relating to the meaning of the term "pilot house" and the function and purpose of building such a pilot house or building. It was very properly the function of the jury to determine this factual question due to the ambiguity inherent in the use of the term.

In the case of *Hawkins v. Frick-Reid Supply Corporation*, 154 F. 2d 88, 89 (5th Cir. 1946), the court stated the general legal proposition that:

> "While the construction of a contract is ordinarily for the court if the terms are ambiguous and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact." (Citing authorities)

To the same effect, see the more recent case of *J. T. Majors & Son, Inc. v. Lippert Bros.*, 263 F. 2d 650 (10th Cir. 1958).

3—Legal Argument to Jury

It was for the purpose of making Tri-State's position abundantly clear to the Court that these arguments were presented. Moreover, it should be pointed out that counsel for Tri-State did not "read to the jury from two

law books" as shown in the record at page 1277. When petitioner's counsel made an objection, Tri-State's attorney stated, "Well your Honor, in view of that objection I will simply reiterate what these decisions say or at least I will summarize it." Counsel did not read the law but merely summarized the principles contained in the two volumes. Furthermore, the principles of law were addressed to the court, not the jury, and the colloquy took place between the court and counsel.

The principles of law referred to were illustrative of the legal position taken by Tri-State on the point involved and if the position is sound as we think we have adequately pointed out to the Court previously in this brief, the stating of the principles to the Court could not be error, but even if it were it would be harmless at most.

4—Prejudicial Comments

Here the petitioner complains about certain "interjections" by the trial judge "stating contentions of the opposing parties."

We submit that a reading of the Appendix to Farnsworth's-petition for certiorari, commencing at page 43, will demonstrate that each of the comments by the trial judge was correct in every respect and not prejudicial to Farnsworth.

Furthermore, and insofar as any possible repetition is concerned, it should be pointed out that Farnsworth made a total of twenty-three separate requests to charge to the court. Tri-State made six requests, and American four requests. It was no doubt an effort on the part of the trial judge to render *less repetitious* by

the interjection of qualifying phrases from time to time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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